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EQUITABLE DIVISION AND THE LAW OF FINDERS

R. H. HELMHOLZ*

INTRODUCTION

FINDERS cases continue to puzzle and interest both courts and commentators. When one person finds an object on land possessed by someone else and that object is unclaimed by the true owner, determination of the right of the initial finder as against the possessor of the land has long raised particular difficulties. One recent commentator concluded ruefully that the cases on the subject "shall go on forever."¹ Even the leading decisions are so uncertain in their rationale that it is difficult to fit new fact situations into established patterns. Only the most confident commentator can hope to do more than discern the meaning of recent developments and offer modest suggestions for improvements in legal practice.

One of the best guides to the traditional rules and leading cases on the subject is a student Comment that was published in the *Fordham Law Review* in 1939.² The Comment has not lost its utility after almost fifty years and was recently cited with approval in an Illinois decision concerning money found in the examination room of a bank's safety deposit vault.³ The Comment reviewed the categories that the law has developed to resolve finders cases, setting out the relevant English and American authorities. It pointed out some of the difficulties attendant upon these categories and concluded by advocating one change in the law—that the distinction between lost and mislaid property should be discarded in favor of a rule that would divide found property between the person who discovers it and the possessor of the locus in quo.⁴

Under traditional rules, mislaid property is awarded to the owner of the locus in quo, it being thought that this will better protect the true owner,⁵ who may recall where he set the goods down and later return to claim them.⁶ This will lead him to the owner of the locus in

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1. Cohen, *The Finders Cases Revisited*, 48 Tex. L. Rev. 1001, 1027 n.67 (1970).

2. Comment, *Lost, Mislaid, and Abandoned Property*, 8 Fordham L. Rev. 222 (1939) [hereinafter cited as *Abandoned Property*].

3. *Paset v. Old Orchard Bank & Trust Co.*, 62 Ill. App. 3d 534, 537, 540 & n.2, 541 n.3, 378 N.E.2d 1264, 1268, 1270 & n.2, 1271 n.3 (1978).

4. See *Abandoned Property*, *supra* note 2, at 237.

5. *Id.*

6. *Id.* at 233-34.

quo but not to the finder, who will have disappeared. If the property is genuinely lost, however, the true owner will be unable to return to claim his property because the goods left his possession without any awareness on his part. Thus, it has been thought preferable to allow the finder to prevail in this situation, unless there are special circumstances.⁷

The 1939 Comment found the distinction between lost and mislaid goods artificial and concluded that it fails to serve its intended purpose. By depriving the finder of any share of mislaid property, the distinction in treatment indirectly encourages him to secrete what he has found.⁸ The distinction has the effect, the Comment argued, of encouraging dishonesty on the part of finders and, therefore, fails in its primary goal—the protection of the true owner.⁹ As a practical matter, a solution was needed which would encourage honesty on the part of all concerned. Hence, the Comment proposed that “the owner of the *locus in quo* . . . and the finder should share in the goods equitably.”¹⁰

Published cases indicate that no American court has explicitly adopted the Comment’s proposal for equitable sharing. Even the Illinois court, which cited the Comment’s survey of the law with approval, went on to reject the specific proposal.¹¹ Such rejection may well be the normal fate of most such suggestions for reform of the law, but the result in this instance nevertheless seems unfortunate. It was a sensible idea and deserved a better fate. This Article therefore reexamines the proposal, evaluating it in light of the case law and scholarship since 1939. The Article concludes that, despite the absence of explicit judicial recognition, the evolving case law does provide authority in some situations for the application of equitable division between the finder of lost or mislaid property and the owner of the *locus in quo*.

I. THE PROPOSAL’S INITIAL APPEAL AND ITS DIFFICULTIES

The theoretical attractions of the proposal for division of found property between the finder and the owner of the *locus in quo* were several in 1939, and they have not lost their appeal over the intervening years. Quite apart from the rationale that a rule of equitable

7. The leading case on the distinction is *Foulke v. New York Consol. R.R.*, 228 N.Y. 269, 127 N.E. 237 (1920). A more recent case to the same effect is *Ray v. Flower Hosp.*, 1 Ohio App. 3d 127, 439 N.E.2d 942 (1981).

8. See *Abandoned Property*, *supra* note 2, at 235.

9. See *id.* at 236-37.

10. *Abandoned Property*, *supra* note 2, at 237.

11. See *Paset v. Old Orchard Bank*, 62 Ill. App. 3d at 541, 378 N.E.2d at 1270. The judge diplomatically described the difference between the Comment’s position and his own as “partial agreement with the result.” *Id.* at 542 n.3, 378 N.E.2d at 1271 n.3.

division would best protect the interests of the true owner,¹² the proposal has much to be said for it. First, adoption of the proposal would not be unprecedented. Roman law, which has shaped much of the common law of personal property,¹³ employed a similar rule of equitable division.¹⁴ Second, the rule provides an equitable way to resolve competing claims that are apt to be about equally strong. It comports with what one instinctively feels to be fair.¹⁵ Third, the rule avoids the fine and artificial distinctions that the law has created between lost and mislaid property. It is not so open to dispute, manipulation, and criticism as are the traditional categories.¹⁶

Despite these evident advantages, equitable division has failed to win explicit judicial recognition. One reason for this failure is not hard to find. The proposal was made without any reference to existing case law and did not suggest any accepted legal categories into which equitable division might fit. It was a call for legislative action, rather than a suggestion of how cases might be determined within the framework of existing law. Although the intervening years have witnessed a good deal of judicial activism to change inherited rules even in this most conservative area of the law, it remains true that judges like to have precedents for their decisions.

Moreover, the adversarial nature of litigation has certainly diminished the chances of the proposed rule's success in practice. The distinction between lost and mislaid property is so fine that, in the absence of the true owner, both the finder and the owner of the locus in quo are encouraged to contend for the whole property. The law allows both sides to claim the whole and present plausible arguments in their favor. Litigants will not share with an opponent when they believe that they can claim the whole. A claim to half of the found property might even be construed as an admission of weakness, a suggestion that the party is not confident in the justice of his claim. The realities of litigation thus discourage either party from making an argument for equitable division.

12. See *supra* notes 5-7 and accompanying text.

13. The law of bailments is an example. See R. Brown, *Law of Personal Property* § 10.1, at 211-12 (W. Raushenbush 3d ed. 1975).

14. Inst. Just. 2.1.39.

15. "Natural Equity" was the stated source of the Roman law rule of equitable division, and the testimony of many generations which have employed principles of instinctive fairness as a basis for decision in finders cases suggests its continuing value. See, e.g., A. Vinnius, In *Quatuor Libros Institutionum Commentarius*, Lib. 2, tit. 1 no. 39 s.v. *Adrianus* (3d ed. 1759); Cohen, *supra* note 1, at 1026-27. Equal division between possible claimants also comports with some recently adopted statutory schemes, such as that in Oklahoma. See Okla. Stat. tit. 70, ch. 50, § 3309(a) (1972) (requiring the contribution of 50% of archaeological or anthropological finds to the state).

16. See *infra* notes 17-47 and accompanying text.

The judicial failure to accept a regular rule of equitable division may therefore easily be explained both by the exigencies of litigation and by the Comment's failure to base its proposal on any decided cases. Case law development and growth in legal thought since the Comment appeared in 1939, however, have provided a more hospitable climate for the proposal that the lost/mislaid distinction be discarded in favor of a regime of equitable division between finder and owner of the locus in quo.

II. THE LOST/MISLAID DISTINCTION AND DEVELOPMENTS SINCE 1939

In its critical aspect, the 1939 Comment has been abundantly confirmed by subsequent developments in the law. The years since then have served to make the distinction between lost and mislaid property even more indefensible as the fundamental basis for deciding cases. If rewarding the finder of "lost goods" but not the finder of mislaid goods ever made sense, it does so no longer, and the underlying argument of the Comment—that the ultimate decision should not depend on the supposed state of mind of the true owner at the time the item passed out of his possession—is well supported by both legal commentary and case law of the intervening forty-five years. At least the evidence against it continues to pile up.

Recent scholarship has confirmed the Comment's theoretical criticism of the lost-mislaid distinction.¹⁷ Commentators have pointed out that normally the only objective evidence of the owner's state of mind is the place where the object was found, and it has repeatedly been shown that this is an uncertain guide.¹⁸ One can as easily lose an item on a bench as he can mislay it there. The distinction invites arbitrary decision. Even if it could be consistently applied, the distinction de-

17. See R. Brown, *supra* note 13, § 3.4, at 29 ("The doctrine of misplaced goods is apt to be artificial, difficult to apply, and doubtful in principle."); D. Burke, *Personal Property in a Nutshell* 103-06 (1983); Cohen, *supra* note 1, 1010-12, 1027 n.67; Harris, *The Concept of Possession in English Law*, in *Oxford Essays in Jurisprudence* 97-98 (A. Guest ed. 1961); Morton, *Public Policy and the Finders Cases*, 1 Wyo. L.J. 101, 108-09 (1946); Reisman, *Possession and the Law of Finders*, 52 Harv. L. Rev. 1105, 1117-23 (1939); Tay, *Problems in the Law of Finding: The U.S. Approach*, 37 Austl. L.J. 350, 352-57 (1964); Tay, *Bridges v. Hawkesworth and the Early History of Finding*, 8 Am. J. Legal Hist. 224, 224-25 (1964) [hereinafter cited as *Tay II*]; 21 Minn. L. Rev. 191, 200-01 (1937); 13 U. Chi. L. Rev. 500, 503 (1946). But see Paulus, *Finder vs. Locus in Quo—An Outline*, 6 Hast. L.J. 180, 190 (1955):

Although there has been some criticism of the great importance placed upon this distinction due to the difficulty of determining whether lost or mislaid goods are involved in a given case, the reason for the distinction appears to be sound, and the determination of fact is not unreasonably speculative since the law involved is well settled.

18. See, e.g., Cohen, *supra* note 1, at 1006-07; Morton, *supra* note 17, at 109.

pend upon a largely fictional difference in mental attitude on the part of the true owner. A full law review analysis, published in 1970, concluded explicitly what others had long thought: There can be no real difference in what an owner thinks when he loses an object and what he thinks when he mislays the same thing.¹⁹ The distinction is built on sand.

Moreover, the stated reason for the distinction, the protection of the true owner, has been largely discredited because it has little real connection with this interest.²⁰ In most litigation, the rights of the true owner are irrelevant. Enough time has elapsed so that the possibility of the owner ever asserting his rights is exceedingly remote. To decide between two present claimants on the basis of a third claim which will never be asserted does not seem sensible. Yet, this is the inevitable result of the lost/mislaid distinction. Moreover, even if the distinction did occasionally protect the rights of an owner who returned after remembering where he had mislaid the object, it strains credulity to suppose that the finder and the owner of the locus in quo would adjust their behavior in the meantime on the basis of a legal distinction as obscure and difficult to apply as this one. Who can suppose that the finder of an item that the law will classify as "mislaid" will turn it over to the owner of the locus in quo any quicker or more willingly than he will turn over an item the law will call "lost"? Both in a theoretical and in a practical sense, the distinction stands discredited by recent scholarship.

A review of the cases decided since 1939 suggests an identical conclusion. In applying, or attempting to apply, the distinction between lost and mislaid property, the courts have not reached predictable or consistent results. A distinction so open to uncertainty and manipulation is a poor basis for deciding cases, and that is precisely what the lost/mislaid distinction has proved to be. Cases that are similar in their essential facts have regularly been decided differently. Cases involving the discovery of money in safety deposit rooms in banks furnish a good example. In one 1953 case, an envelope containing \$1,000 in cash, left on a table in such a room in a Pennsylvania bank, was held to be lost property to which the finder was entitled after efforts to contact the true owner had proved unavailing.²¹ In a 1952 case, however, the bank and not the finder was awarded money found in an advertising folder that had been left in a rack in an examining booth.²² No real difference in the probable state of mind of

19. Cohen, *supra* note 1, at 1006.

20. See, e.g., Cohen, *supra* note 1, at 1007; Morton, *supra* note 17, at 110.

21. Burnley v. First Nat'l Bank, 87 Pa. D. & C. 433 (1953).

22. Dolitsky v. Dollar Sav. Bank, 203 Misc. 262, 118 N.Y.S.2d 65 (1952); see Cohen v. Manufacturers Safe Deposit Co., 271 App. Div. 428, 65 N.Y.S.2d 791 (1946), *rev'd on other grounds*, 297 N.Y. 266, 78 N.E.2d 604 (1948).

the true owners, as shown by the place of finding, can be found in these two cases. Yet in one, the money was treated as lost; in the other, as mislaid.

Goods found under or attached to the ground have received the same inconsistent treatment. In one 1949 case, two swimmers in a Missouri river had come upon an ancient Indian canoe partly embedded in the defendant's land and partly inundated by the river's water. It was held that the canoe belonged to the defendant as owner of the locus in quo, not to the swimmers who had discovered it.²³ In a more recent Michigan case, however, the plaintiff, a hunter, discovered money in a watertight suitcase which had been buried beneath some branches on the defendant's property. It was held in that case that the money was "lost property" and thus subject to appropriation by the hunter.²⁴ It seems impossible to distinguish these two cases according to traditional rules.²⁵ At least it would be difficult to predict the result in the next such case on the basis of these decisions.²⁶

Cases in which money had been found concealed in rubble furnish another example of confusion in the recent decisions. In a 1940 Missouri case, a workman had discovered a metal box containing gold certificates and valuables worth \$12,700 in the rubble of a house during demolition. The court held that the box could not be treated as lost, precluding any claim by the finder-workman.²⁷ In a later Indiana decision, however, the finders succeeded in keeping five rolls of

23. *Allred v. Biegel*, 240 Mo. App. 818, 219 S.W.2d 665 (1949).

24. *Willsmore v. Township of Oceola*, 106 Mich. App. 671, 681, 308 N.W.2d 796, 800 (1981); *see Couch v. Schley*, 272 S.W.2d 171, 196 (Tex. Civ. App. 1954) (money found while digging up garage floor held "mislaid" by Texas Supreme Court), *rev'd*, 155 Tex. 195, 284 S.W.2d 333 (1955).

25. Two Canadian decisions are also of interest. *Compare Grafstein v. Holme & Freeman*, 12 D.L.R.2d 727 (Ont. C.A. 1958) (employer in possession of premises upon which box containing bank notes was found held to have superior right over employee/finder) *with Kowal v. Ellis*, 76 D.L.R.3d 546 (Man. C.A. 1977) (finder, assumed by the court to be a trespasser, held to have superior right over owner of the locus in quo).

26. Facts such as these also raise the question whether found money should be treated as treasure trove. Most American jurisdictions, however, treat treasure trove as lost property. *See United States v. Peter*, 178 F. Supp. 854, 856 n.5 (E.D. La. 1959) (J. Skelley Wright, J.), *aff'd sub nom. Dutsch v. Peter*, 283 F.2d 696 (5th Cir. 1960); *Willsmore v. Township of Oceola*, 106 Mich. App. 671, 681, 308 N.W.2d 796, 800 (1981); *Morton*, *supra* note 17, at 102 n.4; *Reisman*, *supra* note 17, at 1112. *But see Zech v. Accola*, 253 Wis. 80, 33 N.W.2d 232 (1948) (treasure trove not "lost property" for purposes of statute); La. Civ. Code Ann. art. 3423 (West 1952) (maintaining distinction and providing for equitable division of treasure trove). It makes little sense to award what may be intentionally buried property to the finder and yet maintain the distinction between lost and mislaid property for the avowed purpose of protecting the true owner. *See Comment, Finders—Rights as Against the Owner of the Locus in Quo*, 46 Mich. L. Rev. 235 (1947) [hereinafter cited as *Finders' Rights*].

27. *State ex rel. Scott v. Buzard*, 235 Mo. App. 636, 144 S.W.2d 847 (1940).

currency that they had discovered in "a pile of rubble and debris consisting of the frame work of [an old shed] about 1½ feet in depth."²⁸ Why one valuable item should be treated as lost and the other as mislaid, when the places of finding were nearly identical, is difficult to say. The cases seem characteristically to reach "opposite results on similar facts."²⁹

A few generalizations may honestly be made about the cases decided during the years since 1939. Objects found in places truly open to the public, like parking lots or sidewalks, are more likely to be treated as lost than objects found in less open places, like hotel rooms or apartment basements.³⁰ Cases of finding in truly private places are apt to be decided in favor of the owner of the locus in quo, although even this has not been an invariable rule.³¹ However, in the difficult case, when the property is found in a place which is neither truly open to the public nor truly private, the years since 1939 have not witnessed the emergence of any settled method for distinguishing lost from mislaid property. The distinction remains elusive and difficult to apply in any but the easiest case.

Indeed, it is significant that in the meantime serious efforts have been made to explain the law by looking to factors other than the place of finding or the probable state of mind of the true owner. Both commentators³² and judges³³ have sought a better alternative to the traditional understanding of the lost/mislaid distinction in evaluating past cases. The chief alternative looks to the length of time that has elapsed between the loss and either the finding or the ensuing litigation.³⁴ If a long period has gone by, it is suggested, the item is very likely to be treated as lost or abandoned and awarded to the finder. On the other hand, if the elapsed period is relatively short, the owner of the locus in quo will prevail in most instances, it being assumed that the true owner is more likely to appear.

28. *Cline v. Webb*, 130 Ind. App. 300, 164 N.E.2d 367, 368 (1960); see *Neale v. Kirkland*, 486 S.W.2d 165, 168 (Tex. Civ. App. 1972) (money found while digging ditch for new industrial development). *Neale* is notable for its confusion as to the correct definition of "lost" property for purposes of a jury instruction.

29. *Finders' Rights*, *supra* note 26, at 235.

30. See, e.g., *Hill v. Schunk*, 207 Or. 71, 292 P.2d 141 (1956); *Jackson v. Steinberg*, 186 Or. 129, 200 P.2d 376 (1948).

31. Compare *Paset v. Old Orchard Bank & Trust Co.*, 62 Ill. App. 3d 534, 378 N.E.2d 1264 (1978) (unclaimed money found on a chair in safety deposit vault belonged to finder) with *Pyle v. Springfield Marine Bank*, 330 Ill. App. 1, 70 N.E.2d 257 (1946) (bond found in bank safe deposit room to be held by the bank until the appearance of the true owner).

32. *Finders' Rights*, *supra* note 26, at 240.

33. *Dolitsky v. Dollar Sav. Bank*, 203 Misc. 262, 118 N.Y.S.2d 65 (1952).

34. See, e.g., *Riesman*, *supra* note 17, at 1134; *Finders' Rights*, *supra* note 26, at 240.

This distinction has the merit of reasonable connection with actual events. Yet, it cannot carry the weight that has been assigned to it, that of explaining the decided cases on the subject, both because it is rarely referred to explicitly in the decisions and because examination of the facts of many cases reveals that courts have been unwilling to apply it consistently. Items left unclaimed for nearly two years have been treated as mislaid and awarded to the owner of the locus in quo,³⁵ whereas property subject to litigation only eight months after discovery has been treated as lost,³⁶ allowing it to go to the finder. In a 1957 Minnesota decision, dealing with property discovered inside a bank in 1948, the court held that, despite the passage of almost ten years, still the bank had "paramount custody" and was entitled to prevail against the finder.³⁷ Whatever its theoretical attractiveness, therefore, the suggestion that the cases are regularly decided according to the length of time which has elapsed squares no better with the recently decided cases than does the "place of finding" test. It too seems open to uncertainty and manipulation. Even when the standard of passage of time has been adopted by legislation, as in some Unclaimed Property Acts, the subsequent cases suggest that courts will not be consistent in enforcement.³⁸

A second, though less ambitious and comprehensive, suggestion for distinguishing cases decided in favor of the finder from those decided in favor of the owner of the locus in quo looks to the status of the finder.³⁹ Where there is an employment relationship between the finder and the locus owner, it is said that the law does, and should, hold that the finder may not keep what he finds in the course of employment. This is, for example, one of the explanations proffered for the result in *South Staffordshire Water Co. v. Sharman*,⁴⁰ a leading English case in which a man employed to clean a pool of water was held not entitled to the rings he found embedded in mud at the pool's bottom, as against the locus owner who had hired him.⁴¹ This distinction will certainly explain some of the recent cases, and it has

35. *Jackson v. Steinberg*, 186 Or. 129, 200 P.2d 376 (1948); see *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E.2d 661 (1935) (item held mislaid even though more than 14 years had passed between finding and filing of suit).

36. *McDonald v. Railway Express Agency*, 89 Ga. App. 884, 81 S.E.2d 525 (1954).

37. *Dennis v. Northwestern Nat'l Bank*, 249 Minn. 130, 135-36, 81 N.W.2d 254, 257 (1957).

38. See D. Burke, *supra* note 17, at 125-31.

39. See, e.g., *Tay II*, *supra* note 17, at 224-25.

40. [1896] 2 Q.B. 44.

41. *Id.* at 46-47, see J. Salmond, *Jurisprudence* 306-07 (8th ed. 1930); Goodhart, *Three Cases on Possession*, 3 Camb. L.J. 195, 205-06 (1928), reprinted in W. Fryer, *Readings on Personal Property* 72, 82-83 (3d ed. 1938).

sometimes been cited with favor in cases decided during the period. In a 1948 Oregon case, for instance, it was held that a chambermaid was not entitled to the \$800 she discovered while cleaning a hotel room. The court said: "The decisive feature of the present case is the fact that plaintiff was an employee or servant of the owner or occupant of the premises, and . . . she was simply performing the duties of her employment."⁴²

However, when one examines the decided cases on this point it quickly becomes apparent that the results are confused. Cases holding in favor of employee-finders are just as frequent as those holding the reverse. Thus, an employee of the Railway Express Agency emerged victorious from a suit against his employer when he discovered a pocketbook on the floor of the place in which he worked.⁴³ The janitor of a bank prevailed over his employer in securing prior rights to money he found while sweeping up in the safety deposit section.⁴⁴ A steamship steward was held to be entitled to the \$3,010 he discovered on the floor of a men's room on the ship's upper deck even though the discovery occurred while he was on duty.⁴⁵ The federal judge in that case remarked that "the weight of American authority . . . tends to reject any master-servant exception to the law of finders."⁴⁶ It would perhaps have been more accurate for him to have said that sometimes judges reject it and sometimes they do not. Another judge reviewed the cases and concluded exactly the reverse: that "virtually every case" had subordinated the rights of "hotel chambermaids, bank janitors, bank tellers, grocery store bagboys and other employees" to those of their employer.⁴⁷

Thus, although the status of the finder occasionally has been used to determine priority as between finder and locus owner, it remains impossible to reconcile the existing cases on that basis. The status test does not provide a workable means of predicting the outcome of future litigation. As with the distinction between lost and mislaid items based on the place of finding, the distinction between finding by employees and finding by non-employees has appeared incapable of consistent application over the course of the last forty-five years. The criticism of existing law made by the 1939 Comment therefore appears amply borne out by subsequent developments.

42. *Jackson v. Steinberg*, 186 Or. 129, 136, 200 P.2d 376, 378 (1948).

43. *McDonald v. Railway Express Agency*, 89 Ga. App. 884, 81 S.E.2d 525 (1954).

44. *Burnley v. First Nat'l Bank*, 87 Pa. D. & C. 433 (1953).

45. *Kalyvakis v. T.S.S. Olympia*, 181 F. Supp. 32 (S.D.N.Y. 1960).

46. *Id.* at 37.

47. *Ray v. Flower Hosp.*, 1 Ohio App. 3d 127, 129, 439 N.E.2d 942, 945 (1981).

III. THE PROSPECTS FOR EQUITABLE DIVISION

These developments must give rise to renewed hope for proponents of the proposal to discard the fine distinction between lost and mislaid property in favor of a rule of equitable division. It would seem sensible to treat the owner of the locus in quo and the finder under the same regime, and thus equitable division remains an attractive possibility. As the fate of the original proposal makes clear, however, the movement in that direction must be modest and must be more closely tied to existing case law. Efforts to force a sweeping rule on litigants and judges will not succeed. Such efforts might be made by the passage of a statute, although the mixed results in finders cases in states with apparently mandatory statutes demonstrate that success is likely to be limited.⁴⁸ Even without legislation that expressly addresses the issue, however, there may be reason for optimism.

At the very least, the evolution of recent case law opens the possibility of a brighter future for equitable division than it has enjoyed in the past. The cases are moving closer to the concept of equitable division under the principles of an established category of law—joint finding. Though without much formal recognition as yet, the cases decided since 1939 have laid the groundwork for acceptance of the proposal in some, but not all, situations. This has become evident in three ways: a more developed understanding of what actions constitute a “finding” in a legal sense, a larger body of case law in which division has been made between persons who have participated jointly in the “finding” of an object, and an enlarged, or at least continuing, use of equitable factors in deciding finders cases.

First, recent cases reveal that proper legal understanding of what constitutes a “finding” has not stood still. Finding is more than the act of physical appropriation; it requires a high degree of probability that the item being claimed has no immediately ascertainable owner.⁴⁹ The law has long been clear, of course, that a finder must have an intent to claim the object as well as a certain physical relation to it.⁵⁰ If someone merely picks up an object and casually sets it aside, he lacks the requisite intent to qualify as the finder in a legal sense. It now also seems clear that this intent must be coupled with a reason-

48. See *Zech v. Accola*, 253 Wis. 80, 84-85, 33 N.W.2d 232, 235 (1948) (holding Wisconsin Lost Property Statute inapplicable to money found in carpet rags to be woven into new rugs on grounds that the money was a treasure trove, not lost property); see *Bishop v. Ellsworth*, 91 Ill. App. 2d 386, 388, 390, 234 N.E.2d 49, 50, 51 (1968) (holding Illinois statute inapplicable to money found by three small boys who entered plaintiff's salvage yard without permission and “happened upon” the money).

49. See *infra* notes 51-55 and accompanying text.

50. See, e.g., *Grafstein v. Holme & Freeman*, 12 D.L.R.2d 727, 732 (Ont. C.A. 1958); *Tay II*, *supra* note 17, at 236.

able belief that the object is open to appropriation. Thus, one cannot legally "find" a loose book of traveler's checks⁵¹ or shopping carts within the neighborhood of a supermarket.⁵² In such cases, not only is it evident at the time the object is picked up that it is valuable (that is true in almost all finders cases), it is also clear that an ascertainable person has a claim to the object. Hence it cannot be "found" in any sense that the law will credit.⁵³ The finder's possession of the object must not be subject to an apparent, and obviously better, claim.⁵⁴

In some cases of conflict between the first appropriator and the owner of the locus in quo, this more sophisticated understanding of what constitutes a finding provides a legal basis for equitable division between them. In some cases, the object cannot legally be found without the involvement of the locus owner. For example, suppose the passenger in a taxi or a limousine discovers a valuable item. Only the driver can tell him whether the item is open to claim as lost property, so that any "finding" in a legal sense requires collaboration between the two. Such a case reached a New York appellate court in 1963, and it is significant that the court could not decide whether the driver or the passenger was the true finder.⁵⁵ In the court's view, either might conceivably have enjoyed the status of finder,⁵⁶ indicating again that what is meant by finding is more than the simple act of picking up the object in question.

It must be admitted, however, that this developed understanding will not support the proposal for equitable division in all finders cases. It is evident, for example, that where the finding occurs in a truly open place like a sidewalk or parking lot, most courts neither will nor should consider the claim of the owner of the locus in quo.⁵⁷ The very location of the finding precludes his claim because it is immediately obvious that the object has been lost by a stranger. If equitable division is to become the rule in such cases, it must be by legislation—statutory or judicial. In many recurrent situations, however, such as property discovered in rented basements or commercial shops, this developed understanding of what is meant by "finding" fits well with division between the owner of the locus in quo and the person who

51. *State v. Couch*, 250 Iowa 56, 92 N.W.2d 580 (1958).

52. *People v. Stay*, 19 Cal. App. 3d 166, 96 Cal. Rptr. 651 (1971).

53. Perhaps this is the most satisfactory reason for the rule that a thief cannot claim the status of a finder. See *Niederlehner v. Weatherly*, 73 Ohio App. 33, 38, 54 N.E.2d 312, 314-15, *aff'd*, 142 Ohio 366, 51 N.E.2d 1016 (1943).

54. The found object must be "reduced to undisputed possession." *Cesarini v. United States*, 296 F. Supp. 3, 7 (N.D. Ohio 1969) (quoting 1964 Treasury regulation), *aff'd*, 428 F.2d 812 (6th Cir. 1970).

55. *Forman v. Rosetti*, 38 Misc. 317, 238 N.Y.S.2d 328 (1963); see *French v. Sorano*, 74 Wis. 2d 460, 247 N.W.2d 182 (1976).

56. *Forman v. Rosetti*, 38 Misc. 317, 319, 238 N.Y.S.2d 328, 330-31 (1963).

57. See *Fuentes v. Wendt*, 106 Misc. 2d 1030, 436 N.Y.S.2d 801 (1981).

first comes upon the object in question. True finding cannot occur until undisputed possession has been determined.⁵⁸ That can only happen with the concurrence of both the finder and the owner of the locus in quo.⁵⁹

The case law of the past forty-five years also provides support for equitable division in a second way: an expanded receptivity to the concept of joint finding. Because the proposal's appeal rests in part upon a natural desire to treat finder and locus owner as profiting jointly from the discovery, any wider acceptance of the concept of joint finding to encompass both of their claims supports the proposal. Something like this has occurred in the intervening years.

The starting point in the American development of the law of joint finding is an 1896 New Jersey case in which one of five boys who were walking along a railroad track came upon an old sock tied at both ends.⁶⁰ He threw it to one of his companions, and for a time they tossed it back and forth. At length it broke, and money fell out. The boy who had first picked it up claimed all, but the New Jersey Court of Chancery held that the finding had not occurred until the sock burst, by which time possession had become common.⁶¹ In conceptual terms, the intent to possess the sock and its contents, necessary to constitute a finding, did not occur until the boys realized that what they had was more than a worthless rag.

What made sharing the money the correct result, according to this case, was the equivalent status of the boys—they were walking together—and the postponement of the moment of full discovery until they had treated the sock as a common possession.⁶² More recent cases have gone beyond these requirements. It is now clear that common possession before discovery of the value of the item is not absolutely necessary for joint finding to occur.⁶³ Likewise, it is not necessary that the persons be engaged in a joint venture or even be present at the time when the value of the object becomes apparent.⁶⁴ It is enough that "if several persons participated in a finding, they are joint finders with equal rights in the property found."⁶⁵ When the first discoverer is uncertain of what to do with the object, takes it to others and makes

58. See *supra* notes 51-55 and accompanying text.

59. See *supra* note 54 and accompanying text.

60. *Keron v. Cashman*, 33 A. 1055 (N.J. Ch. 1896).

61. *Id.* at 1056.

62. *Id.* at 1056-57.

63. See *Weeks v. Hackett*, 104 Me. 264, 71 A. 858 (1908); *Commonwealth v. Upper Main Line Bank, Paoli*, 37 Pa. D. & C. 2d 297 (1965); *Felt v. Carr*, 59 Pa. D. & C. 237 (1947).

64. *Edmonds v. Ronella*, 73 Misc. 2d 598, 342 N.Y.S.2d 408 (1973).

65. *Id.* at 600, 342 N.Y.S.2d at 411.

them part of his discovery, they become joint finders entitled to share in the fruits of the discovery. This was the result when two boys picked up a manila envelope in a grocery store parking lot. Uncertain about what to do with it, they took it to an older friend for advice. The envelope contained \$12,300 in cash, and the New York court held in a subsequent action that the three of them were joint finders. Each child took a third, because the court determined that the lost money was not found, in a legal sense, until the three children had decided together to claim the money by removing it from the lot.⁶⁶

When the uncertain status of the object requires consultation with the owner of the locus in quo, application of the concept of joint finding seems appropriate. Neither party can "find" in the full legal sense without a joint decision, precisely because it will be unclear whether the object discovered is open to appropriation. The case for joint finding will naturally be strongest where it is initially uncertain whether the owner of the locus in quo is the true owner, as where something of value is found in a small commercial shop. It may be appropriate, however, even in more difficult cases, such as that in which a valuable item has been left in the area of a bank's safety deposit vault. In such a situation it will be immediately obvious to anyone that the item has been lost or mislaid by a customer. The bank has no claim to it other than as a custodian. On the other hand, only the bank can tell the person who came upon the item whether or not the true owner can be ascertained. The determination of whether the item is open to appropriation by someone other than the true owner must be based upon more than the initial discovery in the safety deposit vault. That determination requires consultation with the bank, and true finding as a means of acquiring legal rights to the item cannot exist until that consultation has occurred. In this sense, finding in such circumstances requires joint action.

It should be stressed that such an understanding of joint finding has not been applied in every case decided since 1939 in which it might have been used. Nevertheless, those cases in which it has been applied fit well with the concurrent growth in the legal understanding of finding.⁶⁷ We now see a broader scope for what is meant by the process of finding. It is one in which others besides the initial discoverer participate, at least while the status or value of the object discovered remains uncertain. When this happens, the law may treat the people involved as joint finders. To treat the owner of the locus in quo as one of these co-finders will not, of course, make sense in every case. If he has never been in possession, for instance, and learns of the

66. *Id.*, 342 N.Y.S.2d at 410.

67. See *supra* notes 50-54 and accompanying text.

discovery only after an intermediate report, the concept of joint finding will be inappropriate.⁶⁸ In some of the most difficult cases, however, when the rights of the locus owner and the initial discoverer are most closely balanced, the wider recognition of joint finding suggests that the path is now open to greater acceptance of the proposal for equitable division.

The third development militating in favor of the 1939 Comment's proposal is the persistence of equitable considerations in the reported cases. The proposal was partly based on an intuitive feeling that, when claims are evenly balanced and equitable division is possible, the fairest course would be to divide the property. That same feeling for fairness appears in the recent cases, and to a greater extent than categories found in the treatises might lead one to expect. The recent New York decision holding that joint finding had occurred found support for this result in "practical considerations of fairness and conceptions of common right which influence just and thoughtful men."⁶⁹ It is a revealing statement. Although the judge took the language from an earlier case, there is nothing outdated or obsolete about it. Courts continue to look to "conceptions of common right" in deciding finders cases.⁷⁰ This continuing habit of mind must weigh in favor of the proposal for equitable division.

Equitable concerns appears most frequently in the cases in which the finder has acted dishonestly. "Common right" suggests that he should not be rewarded for his actions, and that is exactly what judges hold. Not all are as blunt as the Ohio judge who found it appropriate to characterize the argument that a "self-confessed thief" could be considered a legitimate finder as "just pure twaddle,"⁷¹ but his viewpoint is reflected in the majority of cases decided since 1939.⁷² The concern also appears in a positive way. Equitable concerns have helped to determine the rights of finders. Thus the "honesty and good faith" of a police officer were important in qualifying him as a legitimate finder in a Pennsylvania case,⁷³ as was the absence of any intent to take what was not his on the part of a hunter in a Michigan case.⁷⁴

68. These are the facts of *Hannah v. Peel*, [1945] K.B. 509. Cf. *Goss v. Bisset*, 411 S.W.2d 50 (Ky. 1967) (chattels abandoned by prior tenant awarded to new tenant because lessor had not been in actual possession).

69. *Edmonds v. Ronella*, 73 Misc. 2d 598, 600, 342 N.Y.S.2d 408, 411 (1973) (quoting *Weeks v. Hackett*, 104 Me. 264, 275, 71 A. 858, 863 (1908)).

70. See *infra* notes 73-77 and accompanying text.

71. *Niederlehner v. Weatherly*, 73 Ohio App. 33, 38, 54 N.E.2d 312, 314 (1943).

72. See, e.g., *Rofrano v. Duffy*, 291 F.2d 848 (2d Cir. 1961); *Favorite v. Miller*, 176 Conn. 310, 407 A.2d 974 (1978); *Bishop v. Ellsworth*, 91 Ill. App. 2d 386, 234 N.E.2d 49 (1968); *Bussler Estate*, 12 Pa. Fiduc. 281 (1962).

73. *Carr v. Summers*, 59 Pa. D. & C. 6, 13 (1947).

74. *Willsmore v. Township of Oceola*, 106 Mich. App. 671, 686, 308 N.W.2d 796, 802-3 (1981).

As one Pennsylvania judge put it in 1953: "The right of the finder depends upon his honesty and entire fairness of conduct."⁷⁵

It may logically be objected that these cases merely distinguish between good faith and bad faith finders. They do not jettison the inherited law of finders in favor of a simple inquiry into which of two claimants is the more deserving. Put this way, this objection is certainly right, and it cannot be contended that acceptance of equitable division is compelled by the emphasis on fairness found in the recent cases. The most that can be said is that it is encouraged. However, such encouragement is no small thing. As the writer of an insightful law review article on the subject noted, instinctive perceptions of fairness, what the author called an "attitudinal or emotional response," have long had a decisive place in finders cases.⁷⁶ The most difficult cases have been precisely those in which these perceptions gave no reason for preferring either the owner of the locus in quo or the finder. The two claims often weigh about the same. Why not treat them as equal in such cases? When courts balance the rights of finders and locus owners on the basis of equitable considerations, as the decided cases show they do, to suggest that courts are free to weigh these rights equally in appropriate cases is no giant leap. Equitable division merely carries a traditional concern for reaching an equitable result one pace forward.

CONCLUSION

This survey of American developments since 1939 produces some case law support for the *Comment's* original proposal that there be equitable division between the initial finder and the owner of the locus in quo. The appropriate vehicle for reaching that result, the cases suggest, is the concept of joint finding. That concept, grounded in a wider and more developed notion of what acts constitute a completed finding and upon a fuller consideration of the implications of the role of fairness in finders cases, provides a way for the proposal to succeed within the framework of accepted legal principles. This framework was missing from the 1939 *Comment*. To some extent, it could have been supplied at that time, although it would clearly not have had the support it has today. It is the case law since 1939 that has provided precedential backing for the proposal. The continued confusion and unpredictability caused by the traditional lost/mislaid distinction counts as a primary inducement to accept the proposal, but the cases themselves suggest a greater receptivity to the notion of joint findings and equitable division than was true in 1939.

75. *Burnley v. First Nat'l Bank*, 87 Pa. D. & C. 433, 437 (1953).

76. See Cohen, *supra* note 1, at 1026-27.

It certainly would have been wiser for the author of the original proposal to have made it modestly. There are cases for which equitable division does not seem appropriate, or at least cases in which legislation would evidently be required to permit the result. When the locus owner of a place open to the public is an absentee, it would go far beyond the case law to suggest that a joint finding had occurred. When the discovery of an unclaimed item occurs in the living room of a private house, no authority suggests that the owner of the house will not be entitled to the item.⁷⁷ These are easy cases. As the recent decisions show, however, there continue to be hard cases in which the claims of the locus owner and the person who makes the discovery are equally strong. Equitable division appears to be a fairer tool for deciding these cases than the manipulation of the lost/mislaid distinction. Such an approach is invited, though not compelled, by developments since 1939.

77. *Cf. Hill v. Schrunk*, 207 Or. 71, 75, 292 P.2d 141, 143 (1956) (money found in private place, with elaborate precautions taken to safeguard it, held not lost property).